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IN THE

Supreme Court of the United States

October Term, 1957

No. 570

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,

Petitioner,

vs.

TROPICAL MARINE PRODUCTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court for the Southern District of Florida is not officially reported but is printed at page 47 of the appendix submitted to the Court of Appeals. The opinion of the Court of Appeals for the Fifth Circuit is reported at 247 F. 2d 116.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1957. A petition for rehearing was denied on September 11, 1957. The petition for a writ of *certiorari* was filed on October 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1245(1) and 2101(c).

Questions Presented

Whether recovery should be denied to an assured on a policy of Marine Hull Insurance where an insured vessel, proven to be seaworthy within the meaning of the policy, was lost in ordinary weather from an unexplained cause.

Whether the failure of a trial court to consider all of the issues presented to it can prevent an appellate court from doing so.

Statutes Involved

This case does not turn upon the construction of any statute, rule or regulation of the United States.

Statement*

The M/V Sea Pak, owned by Respondent, was a wooden hulled vessel of approximately 71 feet in length which sank on August 13, 1954 in the waters of South Caicos Island, British West Indies. At the time of loss, the vessel was insured for $30,000 for a one year period by Petitioner on an American Institute Time-Hulls form policy. The Petitioner refused to pay the loss and this action was commenced.

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* References to the testimony contained in the Appendix submitted by Plaintiff-Appellant below are indicated by Pl. A. followed by the page number.

The vessel was constructed for the United States Coast Guard and purchased by T. A. Barba as a fishing boat in 1953 and subsequently sold to the Respondent. Following purchase by Barba the ship was practically rebuilt with the decks renewed, new frames installed, cypress planking renewed where required by Petitioner's surveyor, and fastenings which hold the hull planking to the frames completely removed and renewed. The vessel also was recaulked, sandblasted and painted. Refrigerating and chilling equipment and crew quarters were installed and the pilot house and bridge were remodeled.

An employee of the owner was in charge of the reconstruction of the vessel (Pl. A. 100). Supervisor of the reconstruction on behalf of the Petitioner was James P. Stuart, a qualified marine surveyor (Pl. A. 66, 73). A preliminary report and final survey were submitted by Stuart to his principals on July 31, 1954 (Pl. A. 37), and August 11, 1953 respectively (Pl. A. 77). These reports and the testimony of the Petitioner's surveyor indicate that the reconstruction and overhaul was accomplished to his complete satisfaction and he estimated the replacement value of the vessel at twice the amount for which it was insured, namely $60,000 (Pl. A. 77). The vessel was also thoroughly inspected by the United States Coast Guard at this time and found to be in proper order (Pl. A. 100).

Following receipt of the reports from its surveyor, Petitioner issued a time hull policy, number 26132, on the SEA PAK, in the amount of $30,000 with risk commencing at noon on August 14, 1953 and extending to noon on August 14, 1954 at a premium of 6½% totaling $1,950. From the date of issuance until the time of loss, the vessel underwent no further formal inspections by Petitioner since none was required under the policy (Pl. A. 75). There was no requirement that the boat be hauled for inspection or drydocked for repairs (Pl. A. 236, 244).

The intended employment of the vessel was to fish and to collect fish and sea food from native fisherman in the Turks and Caicos Islands. On board the catch would be washed, chilled, cleaned, wrapped, quick-frozen and stored in the freezer compartment until discharged at Cockburn Harbor and flown to Miami (Pl. A. 94). This was known to Petitioner and written into the policy as a navigational warranty:

> "Warranted confined to inland and coastal waters of the Bahamas, with occasional trips to the Florida East Coast for repairs."

Upon completion of reconstruction, inspections and issuance of the policy of insurance, the SEA PAK proceeded to the Turks and Caicos Islands where it operated continuously until its loss. During this period there was only ordinary sea water seepage commensurate with wooden hulled vessels and normal seepage through stuffing boxes (Pl A. 101). There was also the ordinary wear and tear to be expected in the trade for which it was insured (Pl. A. 119, 130). While at Caicos the boat was inspected periodically by Captain Berlinski and his crew and growth was scraped from the bottom (Pl. A. 104). Requests to the owner for repair parts were promptly filled (Pl. A. 95, 103). On at least one occasion, within less than three months before the loss, two American divers made an under water inspection of the hull and reported it to be sound (Pl. A. 105, 121, 127).

On about August 9, 1954, the vessel left the plant at Cockburn Harbor under the command of Captain Joseph F. Moran, the company relief captain, an able ship handler, who relieved the regular captain who was on vacation (Pl. A. 134). The vessel had been ordered to bring in about six tons of conch and to do this, operations went forward in one spot until no more conch was available and the boat moved on to the next area. Eventually the

SEA PAK worked itself around to the other side of the island in a relatively protected anchorage in the lee of Long Key where it anchored while receiving conch from the native fishermen using small boats (Pl. A. 142).

About noon of August 12, 1954 the master noticed that the automatic bilge pump was operating more than normally necessary. He checked the bilges but the pump had removed the water. The pump continued to operate at frequent intervals during the afternoon and the Captain made a thorough inspection inside the vessel to determine the source of water. He found some seepage in the bilges at the forward bulkhead separating the engine room and the refrigerated space, however, in the bow beyond the forward reefers there was no indication of any leaking (Pl. A. 141). The bilge beneath the forward refrigerator space was inaccessible because of the interior construction of the vessel.

During the evening the Captain and the engineer again inspected the vessel but still could not determine the source of the water (Pl. A. 142). When the flow continued to increase the Captain decided to return to Cockburn Harbor but because of the unlighted reefs in the area he was unable to get underway until 5 o'clock on the morning of August 13, 1954. As the sun came up, the wind rose and there was some sea running but not of sufficient force to bother the vessel under ordinary circumstances.

As the vessel got underway the flow of water became progressively worse and the Captain had the crew jettison approximately six thousand pounds of fish (Pl. A. 142). During this time the automatic bilge pump was in continual operation and the pump used to wash fish, as well as the two inch hand pump, were constantly operating (Pl. A. 143, 145). The decreased weight of the vessel helped for a short period of time, but the water continued to gain. At approximately two and one half miles from

the plant and about one mile from the harbor entrance, one engine and then the other stopped as water reached the ignition systems. The vessel began to drift and the Captain ordered the anchor dropped with maximum chain of approximately 300 feet. The vessel continued to drift out to sea and both the sea and the wind increased in intensity. Realizing that he could not get the vessel into shore without assistance, the Captain ordered the crew into a dinghy which was towed astern the SEA PAK (Pl. A. 146). The crew and the Captain rowed toward shore and were taken up by a LCVP which was used by the company as a runabout, after that boat had circled the SEA PAK in an attempt to assist (Pl. A. 146). Upon picking up the crew the runabout was sent to the shore plant in an attempt to secure a large gasoline driven pump. As it began the return trip with the pump, the SEA PAK sank.

The captain did not and could not know the cause of the sinking. As an experienced seaman he could only conjecture, from the increased intake when underway, that a butt had sprung and acted as a scoop taking water into the hull (Pl. A. 159). Since the SEA PAK had sunk in approximately 200 fathoms of water, salvage operations were impossible and no confirmation of the captain's theory of the loss was obtainable.

Argument

1. The Petitioner contends that when a vessel sinks under the circumstances of the loss of the SEA PAK, the vessel owner must prove that the vessel was seaworthy immediately prior to springing the leak in order to recover on a policy of hull insurance. Petitioner further contends that the owner has failed to prove such condition and recovery should be denied. The record, policy contract and prior judicial decisions fail to support either contention.

Respondent submits that under American law there is an implied warranty of seaworthiness at the commencement of the term of time-hull insurance policy. This warranty continues throughout the term only to the extent that the vessel owner must exercise due diligence to maintain the vessel in a seaworthy state. *Union Insurance Company of Philadelphia* v. *Smith*, 124 U. S. 405. The initial excellent condition of the SEA PAK was determined by Petitioner's surveyor and was not contested. Proper maintenance of the vessel during the term of insurance was amply explored and supported in testimony of the owner and crew members. Petitioner was unable to offer any evidence of failure by Respondent to exercise due diligence or take any action which might have been taken by a prudent uninsured owner. Respondent submits that the presumption of seaworthiness became operative and was not rebutted by the sudden entry of water, the cause of which at that point could not be accurately ascertained. To require Respondent, *after the event*, to show actual seaworthiness immediately prior to the unexplained entry of water is to deprive the Respondent, as stated by the Court of Appeals, of the protection of his insurance at the time when he needed it most.

Petitioner places unwarranted reliance upon a claimed conflict in the decisions rendered by the various Courts of Appeal. The First Circuit allowed recovery by the vessel owner in *Boston Ins. Co.* v. *Dehydrating Process Co.*, 204 F. 2d 441, on a finding that the vessel was seaworthy in accordance with the insurance contract requirements and that loss could only have resulted from an insured peril. The exact cause of the sinking, as here, was never ascertained.

The Second Circuit found that damage done by the fortuitous action of the sea was an insured peril of the sea and allowed recovery under a policy of marine insurance even after an insured shipowner had been found by the trial court to be grossly negligent in failing to pre-

serve the insured property. *New York, New Haven & Hartford R. Co.* v. *Gray*, 240 F. 2d, 460, *cert. den.*, 353 U. S. 966.

In *Klein* v. *Globe & Rutgers Fire Ins. Co.*, 2 F. 2d, 137, the Third Circuit found that a riverboat sank as the result of an insured peril of the sea and allowed the owner to recover the provable loss although refusing to allow a constructive total loss.

The Fourth Circuit apparently has not yet decided this question since review was impossible due to a procedural defect in *Watson* v. *Providence Washington Ins. Co.*, 201 F. 2d, 736, and any opinion expressed by that forum can only constitute dicta.

In arriving at its decision in the present litigation the Fifth Circuit demonstrated complete consistency with the earlier opinion expressed in *Saskatchewan Government Insurance Office* v. *Spot Pack, Inc.*, 242 F. 2d, 385.

It is abundantly clear that no real conflict exists in the present state of law governing policy contracts of the type issued by Petitioner.

2. The Petitioner contends that the Court of Appeals erred in arriving at a different conclusion from that reached by the trial court and that the conclusion reached could only be made by consideration of issues not before the trial court. Respondent submits that the Court of Appeals acted properly in considering the entire record of litigation and that the necessity to do so arose solely from the failure of the trial court to look to the pleadings, evidence and testimony before it.

As in many marine casualties, the Respondent, as owner of the SEA PAK, was and is unable to determine the exact cause of the sinking of its vessel. This lack of knowledge made it necessary for the Respondent to plead generally the entire policy of insurance in its complaint and specifi-

cally the enumerated risks which were insured. Since no decisive evidence could be adduced at trial, by either Petitioner or Respondent, as to the actual cause of loss, all factors which could in any way assist the court in determining the question were placed in evidence or given in testimony. Trial memoranda submitted by the Respondent clearly spelled out the various risks under which recovery might be had in the suit on the policy of insurance. The trial court chose to ignore all of the insured risks but one, perils of the seas. This choice cannot circumscribe inquiry by an appellate court into all matters properly presented to the lower court.

Respondent further submits that the judicial decisions relied upon by Petitioner have no application to the action of the Court of Appeals. That court reversed the finding of the lower court on the very risk to which the lower court restricted its inquiry. In addition, the Court of Appeals found that even if the Respondent could not have recovered under perils of the seas it could avail itself of the alternative risks clearly written into the insurance contract and thus effect recovery. This expansion from the narrow finding of the lower court could scarcely be considered a trial *de novo*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Wilbur E. Dow, Jr.,
Attorney for Respondent.